

SERVICE DATE- LATE RELEASE MARCH 4, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35851

GREAT CANADIAN RAILTOUR COMPANY LIMITED D/B/A ROCKY MOUNTAINEER
— PETITION FOR EXEMPTION FROM 49 U.S.C. SUBTITLE IV

Decided: March 4, 2015

On October 31, 2014, Great Canadian Railtour Company Limited d/b/a Rocky Mountaineer (Rocky Mountaineer or Petitioner) filed a petition for exemption under 49 U.S.C. § 10502 from 49 U.S.C. Subtitle IV of the Interstate Commerce Act, as amended by the ICC Termination Act of 1995 (ICCTA). Rocky Mountaineer describes itself as an excursion company that offers luxury train vacation packages in the provinces of British Columbia and Alberta, Canada, with limited extensions to Washington State. Petitioner asserts that its seasonal, charter service is a type of entertainment rather than a form of transportation. Nonetheless, Petitioner states that, to the extent that the Board determines that it has jurisdiction over Rocky Mountaineer's services, Petitioner requests Board authorization to operate its rail passenger service between Vancouver, B.C., and Seattle, Wash., and concurrently requests an exemption from all common carrier obligations in Subtitle IV permitted by the statute. Petitioner states that it does not desire, nor is it equipped, to provide freight common carrier service. Rocky Mountaineer maintains that a Subtitle IV exemption would relieve it of the rate and service provisions of the Interstate Commerce Act that it believes are inappropriate for a carrier providing passenger rail service.

Rocky Mountaineer owns a fleet of passenger cars and locomotives and employs its own onboard staff (i.e., car attendants, tour guides, lounge employees, and equipment maintenance personnel) for its excursion routes. Rocky Mountaineer, however, does not own, lease, or operate any rail lines in either Canada or the United States. Rather, Rocky Mountaineer states that it contracts with the National Passenger Railroad Corporation (Amtrak) to provide train and engine crews between Vancouver and Seattle, using Amtrak operating rights over a rail line owned by BNSF Railway Company (BNSF).¹

Rocky Mountaineer's petition involves a new excursion service that it tested in August 2013 and initiated in May 2014.² This new service consists of an extension of Petitioner's

¹ On October 31, 2014, simultaneously with its petition, Rocky Mountaineer filed a Motion for Protective Order covering its confidential agreement with Amtrak. Rocky Mountaineer states that it is conducting operations pursuant to the agreement with Amtrak and that Amtrak's access to the line owned by BNSF is covered by Amtrak's agreement with BNSF.

² In its petition, Rocky Mountaineer requests that it be excused from its past unauthorized operations during 2013 and 2014.

existing two-day train routes between Vancouver and the Canadian Rockies, with an additional half-day journey to or from Seattle.³ Rocky Mountaineer states that the service operates on a limited schedule (with 12 departures per year between May and September) subject to modification based upon market demand. Petitioner seeks authorization to provide passenger rail service between Vancouver and Seattle and simultaneously requests a Subtitle IV exemption should the Board determine that it has jurisdiction over Rocky Mountaineer's excursion services.

On November 20, 2014, BNSF filed a reply urging the Board to deny Rocky Mountaineer's petition for exemption. BNSF states that the service for which authorization and exemption is sought would be operated entirely over a BNSF mainline, the Bellingham Subdivision. BNSF asserts that it is not legally required to allow or sublet the use of its tracks to intercity passenger rail operators other than Amtrak. According to BNSF, it has no agreement with Rocky Mountaineer with respect to operations over the Bellingham Subdivision, and it does not plan to enter into any such agreement. BNSF, however, does have an agreement with Amtrak that permits Amtrak to provide scheduled intercity service between Seattle and Vancouver, subject to various conditions.

According to BNSF, it has informally agreed, in the past, to allow Amtrak to use the Bellingham Subdivision for a specified, limited number of Amtrak-operated Rocky Mountaineer trains (two round trips in 2013 and 12 round trips in 2014).⁴ BNSF, however, asserts that it has no continuing agreement in place with Amtrak to allow for the operation of Rocky Mountaineer trains over the Bellingham Subdivision and that it has not been requested by Amtrak to allow operation of such trains going forward. BNSF expresses concern that the operation of any Rocky Mountaineer trains beyond 2015 would be a problem because of expected increases in freight traffic on the capacity-constrained Bellingham Subdivision. BNSF further maintains that there is no legal basis for Rocky Mountaineer trains to be operated on the Bellingham Subdivision and that the Board should deny Rocky Mountaineer's petition for exemption.

On January 29, 2015, the Board issued a decision finding that the petition for exemption raised issues that required further consideration by the Board and instituting a proceeding. The Board will now direct Rocky Mountaineer to submit a reply to BNSF's November 20th reply, addressing at least the following issues: (1) why an exemption permitting Rocky Mountaineer's proposed operations should be granted when Rocky Mountaineer has no contract with BNSF to operate over the line, BNSF argues that its agreement with Amtrak does not allow for Rocky Mountaineer's use of the line, and BNSF opposes the petition for exemption; (2) if BNSF were to contractually agree to permit Rocky Mountaineer's service for the 2015 season only, what expectation would Rocky Mountaineer have to continue seasonal service over BNSF's line beyond 2015; and (3) whether BNSF would have any means of removing Rocky Mountaineer

³ According to Rocky Mountaineer, the new Seattle extension is only available to passengers as an addition to, and part of, their Canadian rail journey to or from the Canadian Rockies; it is not available for purchase on a stand-alone basis.

⁴ BNSF states that its agreement with Amtrak does not contemplate the use of BNSF's line by other passenger train operators other than Amtrak and that the agreement has no provision addressing the use of BNSF's line by Rocky Mountaineer.

from the line if the Board were to authorize Rocky Mountaineer to provide rail passenger service and exempt it from all Subtitle IV requirements permitted by the statute, including exit licensing. Rocky Mountaineer is directed to file a response by March 24, 2015.

It is ordered:

1. Rocky Mountaineer is directed to file a response to BNSF's reply, addressing the issues described above, by March 24, 2015.
2. This decision is effective on its date of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.